IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MAJESTIK TRUCKING, INC., a Washington corporation,	)	
Respondent,	)	No. 58288-7-I
v.	)	DIVISION ONE
OBAYASHI CORPORATION, a foreign corporation;	)	
Appellant,	)	UNPUBLISHED OPINION
ZURICH AMERICAN INSURANCE COMPANY, a foreign corporation; and THE CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY a/k/a SOUND TRANSIT, a Washington Regional Transit Authority,	)	
Defendants.	)	FILED: April 30, 2007

PER CURIAM. Obayashi Corporation appeals the trial court's order granting summary judgment against it on Majestik Trucking's breach of contract claim. Because Obayashi failed to identify a genuine issue of material fact as to whether signatures of its authorized representatives on truck tickets constituted agreement to the hours and activities listed and required payment according to contractual hourly rates, summary judgment was proper and we affirm.

FACTS

Central Puget Sound Regional Transit (Sound Transit) hired Obayashi Corporation to build the Beacon Hill Tunnel. Obayashi agreed to pay Majestik Trucking, Inc. by the hour to haul material away from the worksite. In February and March of 2005, Majestik billed Obayashi $230,120.62. Obayashi paid Majestic $207,672.64.

Majestik sued Obayashi alleging breach of contract. As an exhibit to its complaint, Majestik presented its contract with Obayashi, which provides:

> Re: Truck Rates for C710 Beacon Hill Tunnel Construction Project, Contract #RTA/LR 105-03
>
> | Service | Hourly Rate | Overtime Rate | Double time Rate |
> |---|---|---|---|
> | Solo | $123.00 | $142.00 | $162.00 |
> | Truck & Trailer | $135.00 | $155.00 | $175.00 |
> | Transfer | $146.00 | $166.00 | $186.00 |
>
> Majestik Trucking agrees to provide on a regularly scheduled basis (3 truck & trailers for 2 – 10 hour shifts per day), truck with the ability to haul 9 full scoops of semi wet material based on trucks with clean boxes every load @ the above specified rate.
>
> Variables to be considered on all loads include the following;
>
> 1) Material remaining from previous load in dump boxes,
> 2) Percentage of water in material being loaded in current load,
>
> We will do everything possible to control item #1, Contractor is responsible for item #2.
>
> Payment terms are to be paid in full by the 10th of every month for previous months billing, provided all stated prerequested forms/documents are provided by Majestik Trucking. Contractor is required to notify Majestik Trucking in advance of payment due date of any subsequent forms/documents required to include time to complete forms properly as to not delay payment.

In support of its motion for summary judgment in the amount of $22,447.98, plus prejudgment interest, Majestik filed the declaration of President

Tom DeHart, attaching invoices totaling $230,120.62 and supporting truck tickets. DeHart stated that Majestik fully performed its work in accordance with the subcontract and billed Obayashi based on the attached truck tickets. DeHart also stated that, according to standard business custom and procedure in the industry, the signature of an authorized Obayashi representative on each truck ticket indicated that Obayashi agreed that the hours and activities on the truck tickets were correct.

In its motion, Majestik argued that the written contract and the truck tickets established Obayashi's obligation to pay the total amount listed in the invoices. In addition to DeHart's testimony regarding the use of truck tickets as a standard business custom and procedure in the industry, Majestik also pointed out that many of the truck tickets state: "Signature of this truck rental invoice . . . will serve as an agreement the quantity of hours and the activities shown are correct." Majestik also requested prejudgment interest in the amount of 1.5 percent per month, as stated on some of the truck tickets.

In response, Obayashi presented the declaration of its Business Manager Jon Kirk, stating that during contract negotiations with DeHart, Kirk and Obayashi Project Manager Masaki Omote repeatedly expressed their expectation that Majestik would "provide trucks with the ability to haul from the Project site 9 full scoops of semi-wet material." According to Kirk, "DeHart indicated that he would build special sides on Majestik's trucks to ensure that those trucks had the ability to haul 9 full scoops of semi-wet material." In return,

Obayashi agreed to pay hourly rates reflecting a per hour premium of approximately $20. Kirk explained that despite the premium, Obayashi expected to reduce its truck hauling expenses because Majestik would be hauling more in each load than its previous truckers.

Kirk also stated that, "[i]n order to ensure that Obayashi Corporation was receiving what it paid for," they asked employee Dusty Willis to count the scoops placed in Majestik trucks. Another employee put Willis' scoop count into spreadsheets filed as attachments to Kirk's declaration. Based on the spreadsheets, Kirk determined that Majestik hauled an average of 7.5 scoops per load and further stated:

> On the basis that the overall average number of scoops per load was less than 9.0 scoops per load, Obayashi only paid Majestik $133,876.61 on invoices from Majestik totaling $155, 609.50, a difference of $21,732.89 which is the majority of the amount which Majestik seeks to recover form Obayashi in its motion for Summary Judgment.

Based on the Kirk declaration and attachments, Obayashi argued that a genuine issue of material fact as to whether Majestik fully performed its subcontract prevented summary judgment. In particular, Obayashi states in its response:

> Majestik never states in its moving papers that each truckload of material it hauled from the Project site contained 9 full scoops of semi-wet material, as required by the parties subcontract. . . .
> . . . In this case, Majestik is asserting non-performance in payment by Obayashi without first showing that it performed its portion of the subcontract – providing trucks with the ability to haul 9 full scoops of semi-wet material.

In its reply, Majestik argued that Obayashi failed to present any evidence that Majestik did not fully perform its contractual obligation, which was – as stated in the Kirk declaration – to provide trucks "with the ability to haul 9 full scoops of semi-wet material." Rather, Obayashi's scoop count demonstrated that Majestik trucks had the ability to haul 9 scoops because at least 20 trucks actually hauled 9 scoops and at least 4 trucks hauled 10 scoops. Majestik argued that Obayashi failed to provide any evidence that established that the scoop count demonstrated the capacity of each truck or that Obayashi filled each truck to capacity. Majestik also pointed out that Obayashi did not dispute that an authorized representative signed each truck ticket, thereby agreeing that the hours and activities listed were correct, and offered no evidence that the tickets were signed under objection.

Following a hearing, the trial court granted Majestik's motion for summary judgment against Obayashi in the principal amount of $22,163.98, plus prejudgment interest at the rate of 1.5 percent. Obayashi appeals.

DISCUSSION

We review a summary judgment order de novo, performing the same inquiry as the trial court. RAP 9.12; Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). This court considers "only evidence and issues called to the attention of the trial court." RAP 9.12. See also Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Summary judgment is appropriate only when, after reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party and all questions of law de novo, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). After the moving party has submitted adequate affidavits to satisfy its burden of demonstrating the absence of any genuine issue of material fact, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

As a preliminary matter, we reject Obayashi's repeated assertions that the trial court could not properly consider or rely on arguments raised by Majestik for the first time in its reply brief in support of summary judgment. Nothing in the record indicates that Obayashi objected to the trial court's consideration of Majestik's reply. Moreover, our review of the record confirms that Majestik did not present any additional evidence with its reply brief and that the arguments in the brief itself either directly respond to evidence submitted and arguments raised by Obayashi or simply provide additional support for arguments advanced in the original motion.

We also reject Majestik's contention that the scoop-count documents are inadmissible and cannot be considered on appeal. Although this court properly reviews de novo any evidentiary rulings made by the trial court in conjunction with a summary judgment motion,[1] the record on appeal does not indicate that the trial court actually made any ruling with regard to the admissibility of this evidence.[2] Because the scoop counts were exhibits to the Kirk declaration listed in the trial court's summary judgment order, we must assume that the trial court considered them. Similarly, although extrinsic evidence about the intent of an agreement or the parties' beliefs about its meaning generally has no bearing on a court's interpretation of unambiguous contract language,[3] the record on appeal does not indicate whether the trial court ruled on the admissibility of such evidence offered by Obayashi in the Kirk declaration. Therefore, we must assume that the trial court considered it.

Obayashi contends that summary judgment was improper because the Kirk declaration raised a genuine issue of material fact as to whether Majestik fulfilled its contractual obligation. In particular, Obayashi argues that Kirk's

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[1] Folsom v. Burger King, 135 Wn.2d at 663.

[2] To the extent that Majestik made any objection to the trial court's consideration of this evidence, Majestik's musings that the evidence was inadmissible were lodged in a footnote in its memorandum. It was incumbent upon Majestik to promote a ruling from the trial court if it so desired one. "Judges are not like pigs, hunting for truffles buried in briefs." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

[3] Hearst Communs., Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (A court may go outside the plain language of a contract only "'to determine the meaning of specific words and terms used' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'") (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)).

description of contract negotiations raised the inference that the contract required Majestik to haul away 9 scoops in every load and the scoop-count documents raised the inference that Majestik failed to provide trucks with clean and empty boxes as obligated under the contract. Thus, Obayashi contends that a genuine issue of material fact existed as to whether Majestik was entitled to the $21,732.89 Kirk withheld based on the scoop count.

But the contract unambiguously demonstrates that Obayashi agreed to pay Majestik by the hour at specific rates for regular time, overtime or double time, according to the type of truck. Although the contract lists two "variables to be considered" and assigns responsibility for those variables to particular parties, there is nothing in the contract suggesting whether or how those variables would impact the hourly rates. Nothing in the Kirk declaration raises an inference that the parties negotiated or agreed whether or how the variables would impact the stated hourly rates.

Moreover, Obayashi failed to present any evidence to the trial court to rebut Majestik's evidence of signed truck tickets and DeHart's testimony that, according to standard business custom and procedure in the industry, the signature of an authorized representative on the truck tickets indicated Obayashi's agreement that the hours and activities shown on the tickets were correct. Obayashi contends that Kirk's request for a scoop count and corresponding reduction in payments to Majestik raises a fact question as to whether the signatures on the truck tickets actually constituted Obayashi's

assent to pay for the hours listed according to the contract rates. We disagree. Given the undisputed evidence of the industry standard, Obayashi would have known that signing the truck tickets constituted agreement to pay the hours and activities listed according to the contract rates and could have noted a reservation or objection based on any concern about scoop count. Given this record, the trial court properly granted summary judgment to Majestik.

Obayashi also challenges the trial court's award of judgment and attorney fees against Sound Transit and Zurich American Insurance Company. In its complaint Majestik asserted lien claims against the portion of Obayashi's earnings retained by Sound Transit under chapter 60.28 RCW and a public works payment bond posted by Zurich under chapter 39.08 RCW. RCW 39.08.030 and RCW 60.28.030 provide for attorney fees in any action brought to enforce a lien. After obtaining summary judgment against Obayashi, Majestik moved for entry of judgment against Obayashi, Zurich and Sound Transit, and for attorney fees and costs under chapter 39.08 RCW and chapter 60.28 RCW. The trial court granted Majestik's motion, entering judgment against Obayashi, Zurich and Sound Transit, and awarding attorney fees.

Obayashi contends that the judgment and fee award against Zurich and Sound Transit was improper because Majestik failed to provide timely notice of a hearing under CR 56 and because Majestik was not a proper claimant against the bond or the retainage fund. But neither Sound Transit nor Zurich appealed the judgment or award of costs and fees and Obayashi has provided no authority

to demonstrate its standing to assert their potential defenses on appeal.

Majestik requests costs and attorney fees on appeal under RAP 14.1, RAP 18.1, chapter 39.08 RCW, and chapter 60.28 RCW. The right to attorney fees and costs below entitles Majestik to attorney fees on appeal, subject to compliance with RAP 18.1. As the prevailing party, Majestik is entitled to costs under RAP 14.2, subject to compliance with RAP 14.4.

Affirmed.

FOR THE COURT: